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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on March 9, 1966, insofar as it sets aside the Board's order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11-23) is reported at 357 F. 2d 182. The Board's decision and order (R. 57-68)[1] are reported at 148 N.L.R.B. 866.

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[1] References to the pleadings, decision and order of the Board, etc., printed as Volume I, Transcript of Record in the court below, are designated "R"; references to portions of the testimony and exhibits, printed as a joint appendix to the briefs of the parties in the court below, are designated "J.A."

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1966, and a decree was entered on March 31, 1966 (App. B, *infra*, pp. 25-26). On June 8, 1966, Mr. Justice Black extended the time for filing a petition for certiorari to and including August 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Finding that the purpose of a provision in a collective bargaining agreement forbidding the subcontracting of certain work was to preserve, for the employees in the bargaining unit covered by the agreement, work that had traditionally been performed by those employees, the court of appeals held that the provision was not unlawful under the "hot cargo" section of the National Labor Relations Act (Section 8(e)), and that a strike by the union that was a party to the agreement to enforce the provision did not violate the secondary boycott section (Section 8(b)(4)(B)). The question presented is whether a work stoppage by a union which is not a party to the agreement but represents other employees of the same employer, designed to help the union that is a party enforce its lawful work preservation clause, is a forbidden secondary boycott.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are printed in Appendix C, *infra*, pp. 27-29.

STATEMENT

1. Houston Insulation Contractors Association consists of a group of contractors in the Houston area, who bargain on a joint basis and have a collective bargaining agreement with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO (R. 34; J.A. 31). Johns-Manville Sales Corporation and Armstrong Contracting and Supply Corporation are members of the Association and signatories to the agreement (R. 34; J.A. 31), which prohibits employer signatories from subcontracting certain work, including the "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, lockers, and tanks (R. 59; 136, 142).

In July 1963, Johns-Manville, while engaged in applying insulation to pipes at a construction project in Texas City, Texas, purchased bands from Techalloy Company, Inc., which had been pre-cut by Techalloy's employees (R. 38; J.A. 12-13). Normally, the task of cutting the bands to specification is performed by Johns-Manville employees (R. 60; J.A. 63-64, 104-105).[2] At the direction of an official of Local 22, the Johns-Manville employees, who were members of that Local, refused to install the Techalloy bands (R. 62-63, 40-41; J.A. 80-81, 104-106).

In 1963, Armstrong was engaged in applying asbestos insulation to pipes at a construction project in

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[2] These bands, in the manufactured state, are rolls or coils of steel. They are cut into strips, and then used in applying insulation material (R. 59-60; J.A. 105).

Victoria, Texas. It purchased straight lengths of asbestos material from Thorpe Products Company (R. 61; J.A. 39-44). These straight lengths were cut to make mitered fittings[3] by Armstrong's employees in Houston, who were members of Local 22. The fittings were installed by Armstrong's employees at the job-site; these employees were members of Local 113, which had jurisdiction over Victoria. Cutting the straight lengths to size was work which Local 22 claimed by virtue of the no-subcontracting provisions of its collective bargaining agreement. (R. 82; J.A. 84-87.)[4] On two occasions, Armstrong purchased from Thorpe fittings on which the mitering work claimed by Armstrong's employees had already been performed by Thorpe (R. 35; J.A. 6, 54-55). When these fittings arrived on the job-site without the identifying labels showing that the mitering had been done by Armstrong's Houston employees, Local 113 instructed Armstrong's employees on the job-site to re-

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[3] A mitered fitting is "an insulation item that is used to cover something other than a straight piece of pipe in a pipe line, and this is made by taking standard insulation pipe covering and cutting it on a bias or miter and then gluing it together or sticking it together so that it will conform to the fitting that you are trying to shape it to" (J.A. 5).

[4] The contract between Local 22 and the Association also provided that members, when operating outside the Local's jurisdiction, should "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the [local] insulation contractors and the local union in that jurisdiction." Local 113's bargaining contract, in turn, contained a ban on subcontracting identical to that in Local 22's contract with the Association. (R. 62; J.A. 132-133.)

fuse to install these fittings (R. 62-63, n. 6, 35, 36; J.A. 53, 54).

2. The Board concluded that Locals 22 and 113 had refused to install the prefabricated Techalloy and Thorpe products, not because they were manufactured under non-union conditions, but because the use of those prefabricated products deprived Johns-Manville and Armstrong employees of work customarily done by them and which they claimed by virtue of the no-subcontracting provision in Local 22's contract with the Association. The Board held that the unions' inducement of work stoppages among the employees of Johns-Manville and Armstrong was thus lawful primary activity—not secondary activity proscribed by Section 8(b)(4)(B) of the Act—and dismissed the unfair labor practice complaint that the Board's General Counsel had issued against the unions. (R. 58-66.)

3. The court of appeals sustained the Board's dismissal of the complaint with regard to Local 22 (Pet. App. 9a-19a). However, it held that the Board had erred in dismissing the complaint as to Local 113. Since that union was neither a party to Local 22's contract nor attempting to procure work for its members, it had, in the view of the court, an insufficient interest to justify its work stoppage, which necessarily had an impact on the supplier of the prefabricated materials (Thorpe). The court remanded the case to the Board for the entry of an appropriate order against Local 113, and for consideration of the question whether the international union had participated in Local 113's work stoppage. (App. A, *infra*, pp. 19a-21a.)

REASONS FOR GRANTING THE WRIT

This is a companion case to *National Labor Relations Board* v. *National Woodwork Manufacturers Association*, and *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, Nos. 111 and 110, this Term, certiorari granted, June 6, 1966. No. 111 presents the question whether a clause forbidding the employer to use certain prefabricated materials, though designed merely to preserve work for the employees of that employer, violates the hot cargo provision (Section 8(e)) of the National Labor Relations Act. No. 110 presents the question whether a work stoppage instituted to enforce such a clause violates Section 8(b)(4)(B), the secondary boycott provision of the Act. The present case involves the related question whether such a work stoppage violates Section 8(b)(4)(B) merely because it is brought, not by the union that is the actual signatory to the agreement containing the clause, but by another union representing other employees of the same employer. We submit that the answer is clearly "no", and that this Court should review the question in view of its close relation to those involved in the *National Woodwork* cases that the Court has decided to hear this Term.

1. Section 8(b)(4)(B) of the National Labor Relations Act (App. C, *infra*, pp. 27-28) bars a union from using strikes or related measures against a neutral, "secondary" employer for the purpose of forcing him to cease doing business with the employer with whom the union has a dispute. A proviso to that

section expressly permits "any primary strike or primary picketing." Assuming—as the court below found[5]—that the no-subcontracting clause in Local 22's contract with the Association had the lawful, primary objective of preserving work for Armstrong's employees represented by Local 22, a work stoppage by those employees, in the event Armstrong violated the agreement, would not, in the circumstances here, violate Section 8(b)(4)(B). Yet at the same time the court below has held that a work stoppage by another union (Local 113) representing other Armstrong employees, though intended only to secure enforcement of their fellow employees' lawful contract provision, was secondary and so violated the statute.

The court reasoned that, since Local 113 was not seeking to obtain work for the employees it represented, and was not a party to Armstrong's contract with Local 22, its interest was "too weak" to privilege its work stoppage, which necessarily had an impact on the employer from whom Armstrong purchased the prefabricated materials. However, if Local 113 was engaged in legitimate primary activity, it is irrelevant that an incidental effect of that activity may have been to put pressure on Armstrong to cease doing business with Thorpe (see *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 673-674); and, on the critical issue whether the activity

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[5] This finding is challenged in the petition of the employers' association, *Houston Insulation Contractors Association* v. *National Labor Relations Board*, No. 206, this Term, which the Board is not opposing.

was primary or secondary, the fact that Local 113 neither was seeking work for its own members nor was a party to Local 22's contract is not dispositive.

The correct test, we submit, is whether the stoppage was directed at the employer with whom Local 113 had a dispute or whether its real object was to conscript that employer in a campaign directed at a third party. Plainly, it was the former. There was no dispute with the third party, Thorpe, the supplier of the prefabricated materials, although Thorpe may incidentally have been affected. The dispute was with Armstrong, and Local 113 limited its strike activity to Armstrong's employees at their work site. Indeed, in view of the common economic interests among all employees working for the same employer, Local 113's work stoppage was a classic instance of "concerted activities for * * * mutual aid or protection," which are protected by Section 7 of the National Labor Relations Act (App. C, *infra*, p. 27).

Section 8(b)(4)(B) is directed at the situation where one union strikes an employer in order to put pressure on another employer—not the converse situation where two unions have a dispute with a single employer and seek to exert pressure on that, and no other, employer. We urge here, as we did in the petition for certiorari in No. 111, this Term (see p. 6, *supra*), that the secondary boycott, and related hot cargo, provisions of the Act apply only where the work stoppage or contract provision is not aimed at the employer of the employees immediately involved, but at some other employer, in whose dispute with the union the first employer—though he takes the

brunt of the union's pressure—is really a neutral. Here, there is no question but that the dispute was with the contractor rather than with the employer who furnished the prefabricated materials, and that the work stoppage was brought by employees of the contractor to place pressure on him, and no one else. Whether or not these employees were as directly aggrieved as those who were direct beneficiaries of the work-preservation clause in question, there was no secondary objective. That (in our view) is dispositive.

2. The decision of the court below with regard to Local 113 is in conflict with the decision of the Seventh Circuit in *Milwaukee Plywood Co.* v. *National Labor Relations Board*, 285 F. 2d 325. There, one union represented the employees of a parent company and in furtherance of a dispute with that company picketed a subsidiary located in another city. The relationship between the two companies was sufficiently close to make them one employer. A second union, representing the employees of truckers making deliveries to the subsidiary, joined the picket line and induced a stoppage of deliveries. The Seventh Circuit upheld the Board's finding that the second union, by thus aiding the first, had not exceeded the bounds of lawful primary activity. The decision below also conflicts with the previous decision of the Fifth Circuit in *National Labor Relations Board* v. *General Drivers, Local 968* (Otis Massey Co.), 225 F. 2d 205, certiorari denied, 350 U.S. 914.[6]

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[6] There the court held that the union representing Otis Massey's warehousemen and truck drivers had not exceeded the bounds of legitimate primary activity when, in further-

CONCLUSION

The decision below, insofar as it sets aside the Board's order, is clearly incorrect and in conflict with the holding of another circuit. The issue involved is closely related to issues that will be before the Court in cases to be argued this Term. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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AUGUST 1966.

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ance of a dispute with Otis Massey involving the latter's employees, it picketed the project where Otis Massey's construction employees, who were represented by other unions, were at work. The court emphasized that a contrary ruling would isolate "other employees of that same primary employer from exercising their statutory right under Section 7 * * * to engage in mutual aid and protection and make common cause with their co-workers." 225 F.2d at 210.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21910

HOUSTON INSULATION CONTRACTORS ASSOCIATION, PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board Sitting at Washington, D. C.

(March 9, 1966.)

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

WOODBURY, Senior Circuit Judge: This is a petition to review and set aside an order of the National Labor Relations Board dismissing a complaint issued upon charges filed in an association of contractors against two local unions and their parent union.

The petitioner, Houston Insulation Contractors Association, Contractors Association or simply Associa-

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* Senior Judge of the First Circuit sitting by designation.

tion, hereinafter, consists of a group of contracting companies in the Houston area banded together for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO. Article VI of the collective bargaining agreement in force between these parties at the time involved provided in material part: "The Employer agrees that he will not sublet or contract out any work described in Article XIII," which included "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, boilers, tanks etc.

Johns-Manville Sales Corporation is a member of the Contractors Association. In 1963 it was engaged in applying insulation to pipe at a construction project at Texas City, Texas, within the territorial jurisdiction of Local 22. In order to secure the insulation of the pipe Johns-Manville's employees cut coils of stainless steel sheets into strips or bands used to hold the insulation around the pipe. In June or July Johns-Manville purchased pre-cut stainless steel bands from Techalloy Company, Inc., a non-union producer of metal products. Johns-Manville employees at the direction of their union officers refused to apply the pre-cut bands.

Armstrong Contracting and Supply Corporation is another member of the Contractors Association. In 1963 it was engaged in applying asbestos insulation to pipes at a construction project in Victoria, Texas, which is not within the territorial jurisdiction of Local 22, but of Local 113 of the International Union. For several years Armstrong had purchased straight lengths of premolded asbestos insulation from Thorpe Products Company, a non-union firm, which Armstrong's union employees had mitered, that is to say,

cut at angles with a saw and glued the cut sections together so that the straight-length material could be used to cover curves or angles in pipe. Originally mitering had been done on the job with hand tools. At the time involved, however, and apparently for several years before, mitering had been done in Armstrong's shop in Houston by its employee-members of Local 22 using power tools inconvenient to move and the mitered fittings delivered to the jobsite. In the summer of 1963 Armstrong purchased pre-mitered fittings from non-union Thorpe Products Company. Armstrong's employees on the Victoria job, members of Local 113, at their union officers' direction refused to apply these pre-mitered fittings.

The Contractors Association filed charges against the International Union and its Locals 22 and 113 on which general counsel for the Board issued a complaint charging that the refusals to apply the goods of Thorpe and Techalloy constituted an unlawful secondary boycott within the meaning of § 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act as it now stands amended, 29 U.S.C. § 158(b)(4)(i) and (ii)(B),[1] asserting that at least "an object" of

[1] "It shall be an unfair labor practice for a labor organization or its agents—

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"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . ., to engage in, a strike or refusal in the course of his employment to use, . . . process, . . . or otherwise handle or work on any good, articles, materials, or commodities . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . . .

* * * * *

"(B) forcing or requiring any person to cease using, . . . handling, . . . or otherwise dealing in the products of

the refusal to apply, which admittedly amounts to coercion, was to require Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. The International Union and the Locals denied that the refusals to use and apply the products of Thorpe and Techalloy constituted a secondary boycott. They asserted that the refusals were protected primary activity because the sole object thereof was to preserve work their members were entitled to perform by virtue of the ban on subcontracting in the collective bargaining agreement.[2]

After hearing, the trial examiner found that "this was not a boycott of nonunion products." And he ruled that "Articles VI and XIII of the agreement with the Contractors Association are lawful." Nevertheless he concluded that the refusal to handle Thorpe and Techalloy products was unlawful wherefore he recommended a cease and desist order against the local unions but not against the International Union saying that the dispute was a local one and that

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any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . ."

[2] In the contract between Local 22 and the Contractors Association the employers agreed that in their operations outside the chartered territory of Local 22 they would abide by the rates of pay, rules and working conditions established by collective bargaining contracts between local insulation contractors and the local union in that territory. Local 113's contract with employers operating within its territorial jurisdiction where the work stoppage involving Armstrong's employees occurred contains a ban against subcontracting similar to the one in the contract between the Contractors Association and Local 22.

he had "no evidence that the International directed it or intervened in it."

The trial examiner rested his conclusion of unlawful activity by the local unions on § 8(e) of the Act, 29 U.S.C. § 158(e), quoted in material part in the margin.[3] He said that the agreement between the Contractors Association and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)." But he said that the exemption did not apply because the evidence was clear that mitering and cutting bands, even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite. In addition he ruled that, even if the workers were entitled to preserve the work of mitering and cutting bands by the contract, they were not entitled under the rule of the so-called *Sand Door* case, *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958), to resort to economic coercion to enforce the contract.

The three-member panel to which the Board delegated its powers pursuant to § 3(b) of the Act disagreed with the trial examiner and ordered the complaint dismissed in its entirety. Without discussing the impact of § 8(e) of the Act, although that section provided the basis for the trial examiner's decision,

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[3] "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract . . . containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, . . ."

the panel held that the activities of the two local unions were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement the lawfulness of which it said appeared to be conceded. On the basis of its conclusion of no unlawful activity by the local unions, it dismissed the complaint as to the International Union.

One member of the panel dissented from the order insofar as it dismissed the charge against Local 113. The majority of the panel pointed out that although Local 113 had no contract with the Contractors Association, nevertheless the Association had agreed with Local 22 that its member companies when operating outside the territorial jurisdiction of that union would "abide by the rates of pay, rules and working conditions established by collective barg ining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and that Local 113's contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Association. Wherefore the majority held that whether Local 113 be "regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22, it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." The dissenting member of the panel said that Local 113 was not a third-party beneficiary of Local 22's bargaining contract with Armstrong and that there was nothing to show that it was acting as agent for Local 22. He considered that since Local 113 had no agreement with the Contractors Association, its attempt to enforce the contract for the benefit of Local 22 constituted unlawful secondary activity.

The petitioner insists in this court that both the facts and the law require the Board to find that all three unions had violated § 8(b)(4)(i) and (ii)(B) of the Act.

On the facts, the petitioner contends that the record conclusively shows that "an object" of the refusals to apply was to force Johns-Manville and Armstrong to cease doing business with Techalloy and Thorpe. In support of this contention it would have us give conclusive effect to the testimony of one Brooks Baker, an officer of Local 22 and a vice-president of the International Union, who at one point testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy." This testimony does indicate that Baker at least may have believed that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. But the Board was not required as a matter of law to accept Baker's statement as gospel in the face of ample testimony, including later testimony of Baker himself, to the effect that the unions' objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and pre-mitered fittings. It may well be that the union officials hoped and expected, certainly we may assume that they would not have minded, if a result of their members' refusal to use and apply the bands and fittings was to put pressure on Techalloy and Thorpe as non-union employers. But hopes and expectations do not necessarily constitute "objects." An

illegal "object" is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend. See *Retail Clerks Union Local 770* v. *NLRB*, 296 F. 2d 368, 373 (C.A.D.C. 1961). The distinction to be drawn as best one can is between an object and a consequence. See *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 672 *et seq.* (1961).

The petitioner also would have us find conclusive evidence of an unlawful union object in its use of gummed labels or decals. These were supplied by the Internationtl Union to employers under contract with its locals and were applied by the union workers to the goods they made. The decals bore serial numbers by which the employer could be identified. When Johns-Manville and Armstrong employees received the Techalloy bands and Thorpe mitered fittings without decals they refused to apply them.

The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting. Moreover, there is undisputed testimony that other products of Thorpe and Techalloy purchased by Armstrong and Johns-Manville, which of course did not bear union decals, were not boycotted, and there is testimony that certain products made by union members and labeled as such were not applied when the serial numbers on the decals indicated that the products were not fabricated by employees entitled to the work under the contract.

Finally the petitioner relies on four other cases involving the same International Union and various of its locals as establishing an illegal pattern of union conduct. Apart from the broad proposition that past misconduct is not conclusive evidence of present guilt, the cases relied upon are clearly distinguishable. Three of them, *International Association etc. and Local 24 (Speed-Line Mf'g Co., Inc.)*, 137 NLRB 1410 (1962); *International Association etc. and Local 125 (Insul-Caustic Corp.)*, 139 NLRB 659 (1962), and *International Association and Local 2 (Speed-Line Mf'g Co., Inc., and Fibrous Glass Products, Inc.,)*, 139 NLRB, 688 (1962), involved "premolded" fittings, not "prefabricated" ones as in the case at bar. The distinction, as the Board pointed out, is crucial, for prefabricated fittings are essentially hand made and could and customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation. Neither Thorpe nor Armstrong makes or has the facilities to make premolded fittings. Nor do the members of the locals have the skills to make such fittings. Thus in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings.

The fourth case relied upon by the petitioner was decided by the Board subsequent to the case at bar and involved the same parties. *Local 22 International Association etc. and Houston Insulation Contractors Association (Mundet Cork Co.)*, 150 NLRB 156 (1965). In that case members of Local 22 employed

by Mundet Cork Co. refused to apply aluminum jacketing supplied by Johns-Manville ostensibly because it did not bear the union decal although in fact it had been made by union labor. The case is a peculiar one but it is readily distinguishable on the trial examiner's finding that the particular aluminum jacketing made by Johns-Manville had never been made and could not have been made by the Mundet employees and hence was not work within the contractual ban on subcontracting.

On the law, the petitioner relies primarily upon § 8(e) of the Act quoted in material part in footnote 3, *supra*. It asserts and we agree that the proviso exempting subcontracting jobsite work in the construction industry does not apply because the Board did not disturb the trial examiner's finding that the mitering and cutting of bands, even when performed by Armstrong and Johns-Manville employees, was performed in their shops and not at the jobsite. But we do not agree with the petitioner that § 8(e) absent its proviso renders the contractual ban on subcontracting unenforcible and void.

It is, of course, true that the agreement not to subcontract the work of preparation or application of insulation materials is in a certain sense an agreement whereby the employer agrees to refrain from handling, using or otherwise dealing in the products of another employer, if not also an agreement not to do business with another person. But to hold that a provision in the collective bargaining agreement against subcontracting was void and unenforcible because of its secondary effects would not square with *Fibreboard Corp.* v. *NLRB*, 379 U.S. 203 (1964), in which the Court held that "contracting out" work previously performed by members of an existing bargaining unit was a statutory subject of collective bar-

gaining under § 8(d) of the Act. Section 8(e) was aimed at so-called "hot cargo" agreements whereby a union in effect forced employers to agree in advance not to do business with other employers with whom the union was not in agreement. It was not the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit. *NLRB* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28 (C.A. 9, 1964), and cases cited. In short, § 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. "Primary subcontracting claims, on the other hand, fall outside the ambit of § 8(e) . . . ." *Orange Belt District Council of Painters, No. 48* v. *NLRB*, 328 F. 2d 534, 537, 538 (C.A.D.C. 1964). An agreement banning the subcontracting of preparation work such as the one in the case at bar, not being a "hot cargo" agreement or on its face an attempt at a secondary boycott *in futuro*, § 8(e) does not apply.

We agree with the Board's dismissal of the complaint as to Local 22. We do not, however, agree with its dismissal of the complaint as to Local 113.

The problem presented by the refusal of the members of Local 113 to apply the pre-mitered fittings is so far as we know unique. As we have already pointed out Local 113 had no contract with Armstrong, although the Contractors Association of which Armstrong was a member had a contract with Local 22 which provided that members when operating outside the Local's jurisdiction "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that juris-

diction" and Local 113's bargaining contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Contractors Association. On this basis the Board held that "Whether Local 113 is regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22 it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." We do not agree.

The record is clear, as the trial examiner found, that mitering fittings would not have been done by members of Local 113 at the jobsite in Victoria, Texas, but would have been done by members of Local 22 employed by Armstrong at its shop in Houston. Thus the third party beneficiary theory is inapplicable because Local 113 would not have reaped any benefit from Local 22's contract. The agency theory has no factual support in the record. Moreover, we think the question presented by the behavior of Local 113 is not to be framed in terms of principles of the law of contracts or agency, developed in other contexts for other purposes. The fact of the matter is that Local 113 put economic pressure on an employer with whom it had no collective bargaining agreement to secure benefits to employees in another unit, Local 22. The question is whether such action by Local 113 comports with the underlying purposes and objectives of the Act. We think it does not.

Since Local 113 was not attempting to procure work for its members (they would not have done the mitering anyway) if it was not attempting to force Armstrong to cease and refrain from doing business with Thorpe, it was engaging in a controversy not its own but in Local 22's controversy with Armstrong. No doubt Local 113 had an emotional interest in com-

ing to the aid of its sister local. But it had no economic interest in Local 22's claim of breach of contract. We think an emotional interest is too weak to justify conduct which necessarily has coercive impact on a neutral employer. Even if, strictly speaking, Local 113 was not engaged in a secondary boycott, it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer. We think the thrust of the Act, particularly § 8(b)(4), as set out in many secondary boycott cases[4] is to require each union to restrict its economic coercion to its own labor disputes and not to use that weapon in aid of another union.

Since we are affirming the order of the Board in part and reversing it in part the basis for the Board's declining to pass on the involvement of the International Union, *i.e.*, its finding that neither local had violated the Act, is destroyed. The case must go back to the Board for decision of the question of the International Union's participation in Local 113's work stoppage.

The Order of the Board is enforced in part and reversed in part, and the case is remanded to the Board for further proceedings consistent with this opinion.

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[4] See *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675, 692 (1951), in which the Court described the congressional objectives of the Act as ". . . of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,910

HOUSTON INSULATION CONTRACTORS ASSOCIATION, PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE

Before: Woodbury,* Wisdom and Bell, Circuit Judges

BY THE COURT:

THIS CAUSE came on to be heard upon a petition of the Houston Insulation Contractors Association to review and set aside an order of the National Labor Relations Board issued on September 4, 1964, dismissing a complaint against International Association of Heat and Frost Insulators and its Locals 22 and 113. The Court heard argument of respective counsel on March 25, 1965, and has considered the briefs and transcript of record filed in this cause. On March 9, 1966, the Court, being fully advised in the premises handed down its opinion affirming the said

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* Senior Judge of the First Circuit sitting by designation.

order of the Board in part and reversing in part, and remanding the case to the Board for further proceedings consistent with its opinion. In conformity therewith it is hereby

ORDERED, ADJUDGED, AND DECREED by the United States Court of Appeals for the Fifth Circuit that that part of the Board's order dismissing a complaint against Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO be affirmed and that the part of the order dismissing the complaint against International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and its Local 113, be reversed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the case be remanded to the Board for further proceedings consistent with the opinion of this Court.

ENTERED MAR 31 1966

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * *

Section 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other pro-

ducer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include per-

sons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

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